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In an attempt to assuage critics concerned that the Civil Rights Act of 1964[1] might force integration of those few "public" accommodations that were in fact enclaves of private association,[2] and might terminate state prerogatives in proscribing discriminatory employment practices,[3] the late Senator Hubert H. Humphrey[4] remarked: "I wish to make it clear that I do not believe there should be a Federal law which provides that a private club should be managed this way, or managed that way . . . ."[5] Senator Humphrey subsequently asserted: "As I have stated . . . title VII specifically provides for the continued effectiveness of State laws and procedures for dealing with discrimination in employment. Where State remedies are available, an aggrieved person would always be free to take advantage of them."[6] Had Senator Humphrey made these statements together, he might have prevented the current battle[7] over whether Congress' exclusion of private clubs from the am-

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1. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (1976)). The 1964 Act was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

2. Title II of the 1964 Act prohibits discrimination in public accommodations on the basis of race, color, religion, and national origin. 42 U.S.C. § 2000a-2 (1976).

3. Title VII of the 1964 Act prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. *Id.* § 2000e-2.

4. Senator Humphrey served as floor manager for the 1964 Act.

5. 110 CONG. REC. 6008 (1964) (statement of Sen. Humphrey).

6. *Id.* at 6550.

7. Since the statute does not expressly address whether title VII's exemption acts to shield private clubs from state employment laws, it is anticipated that this issue will be litigated in states attempting to regulate discrimination in private club employment practices. The case of Bohemian Club v. Fair Employment and Housing Comm'n, No. 119026 (Sonoma County Super. Ct., tentative decision filed Mar. 25, 1983), exemplifies the current controversy concerning this issue. This superior court action was filed by the Bohemian

bit of title VII[8] preempts regulation of these clubs as employers under the supremacy clause of the United States Constitution. Since Congress failed to expressly provide this in the statute, we must draw conclusions based on inferences from remarks like those of Senator Humphrey, from the decisions regarding the interrelationship of the 1964 Act with the Civil Rights Act of 1866,[9] and, most importantly, from the plain language of title VII itself.

This Article addresses the narrow question[10] of whether states are precluded under the supremacy clause from including bona fide private membership clubs as "employers" under the states' fair employment practices laws (FEP laws).[11] It is the position of this Article that the

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Club to seek review of a decision by California's Fair Employment and Housing Commission, DFEH v. Bohemian Club, FEHC Dec. No. 81-19 (1981), finding that title VII does not preempt California's regulation of the employment practices of private clubs, and that the all-male Bohemian Club's practice of hiring only men violated the state's antidiscrimination laws.

8. 42 U.S.C. § 2000e(b) (1976).

9. *Id.* §§ 1981, 1982. Section 1981 provides: "All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." The Supreme Court in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), held that § 1981 affords a federal remedy against discrimination in private employment on the basis of race. *Id.* at 459-60.

10. This Article does not address the question of whether a state strategy of targeting private clubs for civil rights enforcement is advisable, or the question of whether such actions could withstand alternative constitutional challenges. For example, an argument could be made that a state's regulation of private clubs' employment practices constitutes an unconstitutional abridgment of the club members' associational rights. The argument would presuppose a factual situation in which employees are essential to a club's continued operation and the employees' duties require them to commingle with members during associational activities, and it would be premised on dictum by the Supreme Court that:

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974) (citation omitted). It is, however, very doubtful whether associational rights are implicated in employer-employee relationships. *See, e.g.,* Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977), where the court held:

> [E]ven if the Cravath partnership did enjoy First Amendment protections, the application of title VII to the process whereby Cravath promotes its employees to partner would not infringe the partnership's First Amendment rights. Application of the title VII to this case does not prevent the partners from associating for political, social and economic goals.

Id. at 129 (citations omitted).

11. The following states do not exempt private clubs from their FEP laws of general

explicit preemption provision contained in title XI of the 1964 Act expressly excuses no one from liability under state FEP laws. The decisions by those courts that have read the private club exemptions of the 1964 Act into the Civil Rights Act of 1866 by implication are inapposite and unpersuasive.

The 1964 Act's Exemption of Private Membership Clubs

Section 701(b)(2) of the 1964 Act excludes from the definition of "employer" any bona fide private membership club exempt under the Internal Revenue Code.[12] While a club's tax exempt status may be readily established,[13] that status alone is insufficient to merit exemption from the 1964 Act. To be exempt from title VII coverage under that exception, the club must be both tax exempt and a bona fide private membership club.[14] Indeed, to date the Supreme Court has found it unnecessary to determine whether the private club exemptions in the 1964 Act must be read by implication into the Civil Rights Act of 1866[15] because it has never found that the charged entity was in fact a "bona fide" private membership club.[16]

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application: California, CAL. GOV'T CODE §§ 12900-12996 (West 1980 & Supp. 1983); Colorado, COLO. REV. STAT. §§ 24-34-401 to 24-34-406 (1973); Connecticut, CONN. GEN. STAT. §§ 46a-51 to 46a-99 (1977); Delaware, DEL. CODE ANN. tit. 19, §§ 710-718 (1974); Florida, FLA. STAT. §§ 23.161-23.167 (Supp. 1983); Hawaii, HAWAII REV. STAT. §§ 378-1 to 378-9 (1976); Idaho, IDAHO CODE §§ 67-5901 to 67-5912 (1980); Illinois, ILL. REV. STAT. ch. 68, §§ 2-101 to 2-105 (Supp. 1983); Iowa, IOWA CODE §§ 601A.1-601A.19 (1975); Kentucky, KY. REV. STAT. §§ 344.010-344.990 (1983); Maine, ME. REV. STAT. ANN. tit. 5, §§ 4571-4574 (1979); Michigan, MICH. COMP. LAWS §§ 37.2101-37.2804 (Supp. 1983); Minnesota, MINN. STAT. §§ 363.01-363.14 (Supp. 1983); Missouri, MO. REV. STAT. §§ 296.010-296.070 (Supp. 1983); New Jersey, N.J. REV. STAT. §§ 10:5-1 to 10:5-28 (1976); New Mexico, N.M. STAT. ANN. §§ 28-1-1 to 28-1-14 (1978); New York, N.Y. EXEC. LAW §§ 290-301 (McKinney 1982); Ohio, OHIO REV. CODE ANN. §§ 4112.01-4112.99 (Page 1980); Oregon, OR. REV. STAT. §§ 659.010-659.990 (1980); Rhode Island, R.I. GEN. LAWS §§ 28-5-1 to 28-5-39 (1979); South Dakota, S.D. CODIFIED LAWS ANN. §§ 20-13-1 to 20-13-56 (1979); Tennessee, TENN. CODE ANN. §§ 41-21-101 to 41-21-124 (1982); Vermont, VT. STAT. ANN. tit. 21, §§ 495-496 (1978); Washington, WASH. REV. CODE §§ 49.60.010-49.60.320 (1974); Wisconsin, WIS. STAT. §§ 111.31-111.395 (1974); and Wyoming, WYO. STAT. §§ 27-9-101 to 27-9-108 (1977).

12. 42 U.S.C. § 2000e(b)(2) (1976). *See* I.R.C. § 501(c) (1976).

13. A question may arise, however, as to whether a club is *entitled* to its tax exempt status. *See, e.g.*, Quijano v. University Fed. Credit Union, 617 F.2d 129, 130 n.4 (5th Cir. 1980); Wright v. Cork Club, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970), *rev'd on other grounds*, 632 F.2d 309 (4th Cir. 1980) (district court held that "the fact that the Cork Club has been exempted from the Federal Income tax by virute of the 'Social Club' exemption is of little evidentiary value in this matter [because] this determination by the District Director was not made in a contested proceeding. This court does not know what amount of fact finding he did, nor what factors he considered.").

14. EEOC v. Wooster Brush Co., 523 F. Supp. 1256, 1263 (N.D. Ohio 1981).

15. 42 U.S.C. §§ 1981, 1982 (1976).

16. *See, e.g.*, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969) (recreation

The Preemption Doctrine

The preemption principle is derived from the supremacy clause of the federal Constitution, which declares that federal law shall be "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[17] Given the myriad contexts in which the Supreme Court has been obliged to interpret the supremacy clause, it is not surprising that the Court has stated in a variety of ways the threshold standard for determining whether the clause invests Congress with exclusive authority over a subject matter. "Where, as here, the field which Congress is said to have preempted has been traditionally occupied by the States, . . . 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress.' "[18] Preemption exists only when the nature of the federally regulated subject matter implicitly requires preemption or when Congress explicitly

association showed "no plan or purpose of exclusiveness" because it was "open to every white person within the geographic area, there being no selective element other than race"); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 438 (1973) (recreation association admitting all whites within three-quarter mile area indistinguishable from Sullivan); *see also* Runyon v. McCrary, 427 U.S. 160, 172-73 n.10 (1976) (the "private" schools' racial admission policies "do not raise the issue of whether the 'private club or other [private] establishment' exemption in § 201(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(e), operates to narrow § 1 of the Civil Rights Act of 1866" because "[t]he pattern of exclusion is . . . directly analagous to that at issue in *Sullivan* and *Tillman*" and because "Title II of the Civil Rights Act of 1964, of which the 'private club' exemption is a part, does not by its terms reach private schools").

Several lower courts have reached the same result. *See, e.g.*, Wright v. Salisbury Club, Ltd., 632 F.2d 309, 312-13 (4th Cir. 1980) (citing *Sullivan*, *Tillman*, and *McCrary*, court held that the club is not exempted under the 1964 Act because it "does not follow a selective membership policy," "has actively solicited members through public advertising," and "has served the commercial interests of the developer of the Salisbury subdivision"); Quijano v. University Fed. Credit Union, 617 F.2d 129, 133 (5th Cir. 1980) (credit unions "exist for purely mercantile purposes," and "[l]ike 'auto clubs' credit unions are not clubs in any sense of the word"); EEOC v. Wooster Brush Co., 523 F. Supp. 1256, 1264 (N.D. Ohio 1981) (insurance association is for "personal benefit" of members and "does [not] impose meaningful conditions of limited membership"). For criteria in determining bona fide private membership club status under the 1964 Act, see Note, *The Private Club Exemption To The Civil Rights Act of 1964: A Study In Judicial Confusion*, 44 N.Y.U. L. REV. 1112 (1969).

17. U.S. CONST. art. VI, cl. 2.

18. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (emphasis added). The *Rice* Court held that Illinois law, which provided a more comprehensive scheme for the regulation of warehouses and warehouse workers than that prescribed by the United States Warehouse Act, was preempted under the federal act's explicit preemption provision that dictated that federal "power, jurisdiction and authority shall be exclusive with respect to all persons . . . ." 331 U.S. at 233.

preempts the area by specific leglislation.[19] Federal supremacy is not easily presumed without some clear manifestation of that intention by Congress.[20]

The proper frame of reference for the present discussion is the Court's invariable recognition that the states possess broad authority under their police powers in the area of employment practices, and that state laws on that subject are not easily preempted.[21] However, to understand the Supreme Court's analysis of the 1964 Act's exemption for private clubs as it relates to state FEP laws that define "employer" to include such clubs, one must proceed with caution. At least one commentator expressed the concern that preemption decisions of the Supreme Court display "an ad hoc, unprincipled quality, seemingly bereft of any consistent doctrinal basis."[22] In fairness to the Court, how-

19. "Federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963). In *Florida Lime* the Court held, inter alia, that a state consumer protection measure that prescribed minimum oil content as the criterion for importation of avocados, a criterion rejected by federal authorities in favor of the criteria of date, size, and weight for regulating avocado marketing under the Agricultural Adjustment Act, was not inconsistent with the latter Act's stated purpose to establish and maintain "such minimum standards of quality and maturity . . . as will effectuate . . . orderly marketing . . . ." *Id.* at 147-48.

20. " 'It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.' " New York Dep't of Social Serv. v. Dublino, 413 U.S. 405, 413 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)). The *Dublino* Court held that the Social Security Act "allows for complementary state work incentive programs and procedures incident thereto—even if they become conditions for continued assistance" under the Aid to Families with Dependent Children Program. *Id.* at 422.

21. DeCanas v. Bica, 424 U.S. 351, 356 (1976).

22. Comment, *The 1967 Age Discrimination In Employment Act And Preemption: A Case for Broader State Laws*, 12 U.S.F.L. REV. 283, 290 n.45 (1978). *See, e.g.*, Justice Rehnquist's dissent, joined by Justices Brennan and Stewart, in McCarty v. McCarty, 453 U.S. 210 (1981), a case in which the Court held that federal law providing for military nondisability retirement benefits preempts application of community property laws:

> For all its purported reliance on *Hisquierdo v. Hisquierdo*, the Court fails either to quote or cite the test for preemption which *Hisquierdo* established. In that case the Court began its analysis, after noting that States "lay on the guiding hand" in marriage law questions, by stating: "On the rare occasion where state family law has come into conflict with the federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted." The reason for the omission of this seemingly critical sentence from the Court's opinion today is of course quite clear: the Court cannot, even to its satisfaction, plausibly maintain that Congress has 'positively required by direct enactment' that California's community property law be preempted by the provisions governing military retired pay.

ever, it must be recognized that preemption questions as a whole are not easily analyzed. The Court explained this difficulty in *Hines v. Davidowitz*,[23] in which it first set forth the criterion for determining whether state law gives way to federal law, a criterion now firmly established in the Court's decisions[24]:

> There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. The Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[25]

In practice, laws protecting vital state interests have been preempted only when preemption is expressly intended, and, in rare cases, when some national policy is hindered.[26]

Id. at 236-37 (Rehnquist, J., dissenting) (quoting Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979)) (citations omitted).

23. 312 U.S. 52 (1941).

24. Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977). *Jones* itself provides an example of the Court's enigmatic application of the preemption doctrine. There the Court addressed, inter alia, whether California's commodity net weight labeling law, which made no allowance for loss of moisture in transit, was superceded by federal labeling requirements that permitted such a variance. The Court noted that "California law apparently differs not at all from federal law, as applied" with respect to overpackaging in that each authority's practice was to disregard commodities that weighed more than the stated net weight, and held that the state law was thus not preempted on that basis. *Id.* at 539. However, the Court thereafter speculated that producers would overpackage to insure compliance with state law, and incongruously held that the law would thus hinder the stated congressional purpose to "facilitate value comparisons." *Id.* at 542. In decrying such a literal reading of the stated congressional purpose, the minority understandably commented that "viewing such a purpose to be sufficient to require preemption while the very purpose is ignored in practice by the administering federal agency reverses the normal presumption against finding preemption." *Id.* at 547 (Rehnquist, J., dissenting).

25. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (footnotes omitted). The Court in *Hines* struck down as incompatible with a uniform immigration policy a Pennsylvania law that imposed alien registration requirements beyond those mandated by the federal Immigration and Nationality Act (INA). *Cf.* DeCanas v. Bica, 424 U.S. 351, 357 (1976) (the Court would "not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship covered by [the California Labor Code section prohibiting the knowing employment of illegal aliens] in a manner consistent with pertinent federal laws").

26. *See* Note, *A Framework For Preemption Analysis*, 88 YALE L.J. 363, 389 (1978).

The Preemption Provision of the 1964 Act

When Congress has promulgated an explicit preemption provision, the standard set forth in *Hines* must be applied.[27] The 1964 Act contains a preemption provision, codified at section 1104 of title XI, which reads:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.[28]

Section 1104 answers in the negative the initial question of whether Congress has assumed complete preeminence in the field of discrimination law, and instead poses a two-tier test for determining whether provisions of a particular state law are preempted by the 1964 Act: whether the state provisions are "inconsistent with any of the purposes" of the federal enactment, or whether they are "inconsistent with . . . any provision thereof."

With respect to the purposes of title VII, the Supreme Court has

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Based on Congress' express and specific intent to preempt "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," the Supreme Court recently held that "New York's Human Rights Law is preempted with respect to ERISA benefit plans only insofar as it prohibits practices that are lawful under federal law." Shaw v. Delta Air Lines, Inc., 103 S. Ct. 2890, 2906 (1983). Because New York's Human Rights Law forbids discrimination in employee benefit plans on the basis of pregnancy, and did so before an equivalent amendment to title VII was enacted in 1976, 42 U.S.C. § 2000e(k) (1976 & Supp. V 1981), its operation before the effective date of the title VII amendment was preempted by ERISA. This result was mandated because ERISA provides, in addition to its preemption clause, that "[n]othing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . ." 29 U.S.C. § 1144(d) (1976). In holding that state antidiscrimination laws are not saved by this clause of the express preemption clause, the *Shaw* Court nonetheless recognized that state laws and their administrative schemes play a significant role in the enforcement of title VII. The Court further recognized that title VII does not prevent states from extending their antidiscrimination laws to areas not covered by title VII, stating: "Quite simply, title VII is neutral on the subject of all employment practices it does not prohibit." 103 S. Ct. at 2903. Indeed, the Court noted that "Title VII expressly preserves nonconflicting state laws in its § 708." *Id.*

27. Jones v. Rath Packing Co., 430 U.S. 519, 530-32 (1977). *See also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 233 (1947). The Court has implicitly harmonized its employment of variously stated standards for determining whether the authority to legislate in a given area is vested in Congress alone with its obligation to apply explicit preemption provisions, by noting that such provisions are "presumably intended to do no more than recognize explicitly an accommodation between federal and state interests to which Congress and the decisions of this Court have consistently adhered." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 144-45 n.13 (1963).

28. 42 U.S.C. § 2000h-4 (1976).

noted repeatedly that "Congress enacted Title VII of the Civil Rights Act of 1964 . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin."[29] Enforcement of state FEP laws against private clubs is consistent with that purpose. The Massachusetts Supreme Judicial Court held in an analogous context, at a time when title VII had been interpreted not to include pregnancy-related disabilities within its proscription of sex discrimination,[30] that an interpretation of the state's antidiscrimination law requiring the inclusion of pregnancy-related disabilities in a comprehensive disability plan would impose a higher duty than that existing under federal law, but would not be inconsistent with the express purpose of title VII of eliminating all practices which lead to inequality in employment opportunity.[31]

It may be accurate to state that by including a private club exemption similar to section 201(b) of title II[32] Congress made it possible for those who wish to restrict their personal association to also determine whom they will employ.[33] It would, however, be incorrect to infer from the mere presence of the section 701 exemption that there existed a secondary congressional purpose to immunize clubs from all FEP laws.[34] In fact, the Supreme Court has held, in *Savage v. Jones*,[35] that preemption in areas not covered by the federal legislation is never inferred from the mere fact that the regulation occupies only a limited field.[36]

29. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). *Accord* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 457 (1975).

30. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). *Gilbert* has since been overturned by congressional enactment of § 701(k). 42 U.S.C. § 2000e(k) (Supp. V 1981).

31. Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination, 375 Mass. 160, 167, 375 N.E. 2d 1192, 1195 (1978). *Cf.* New York Dep't of Social Serv. v. Dublino, 413 U.S. 405, 419-20 (1973) (the Court explained that "[i]t would be incongruous for Congress on the one hand to promote work opportunities for AFDC recipients and on the other to prevent States from undertaking supplementary efforts towards this very same end. We cannot interpret federal statutes to negate their own stated purposes.").

32. 42 U.S.C. § 2000a to 2000a-6 (1976) (the 1964 Act's public accommodations title).

33. Fesal v. Masonic Home of Del., Inc., 428 F. Supp. 573, 577 (D.C. Del. 1977).

34. The *Fesal* court did not draw this inference; it merely sought to clarify the nature of the § 701 exemption as a prelude to holding that a nursing home, though distinctly private, was not a "membership club" under that section. *Id.* at 578.

35. 225 U.S. 501 (1912).

36. *Id.* at 533. *Accord* Kelly v. Washington, 302 U.S. 1, 13 (1937) (The Court found that, "in relation to the inspection of the hull and machinery of respondents' tugs, the state touches that which the federal laws and regulations have left untouched. There is plainly no inconsistency with the federal provisions.").

The task of evaluating whether Congress, in enacting title VII of the 1964 Act, had a secondary purpose to exempt private clubs and preempt state law regarding these employers, is simplified by the fact that there is no legislative history discussing the purpose of this statutory exemption.[37] In the absence of strong legislative history to the contrary, the plain purpose of the statute controls.[38] The only congressional discussion of remote relevance involves title II's private club exemption clause,[39] which is unique to that title's proscription of discriminatory admission policies in public accommodations. While it can reasonably be argued that the legislative history evidences Congress' concern about the constitutionality of proscribing discriminatory membership policies by truly private clubs and its intent to avoid constitutional infirmities in the 1964 Act,[40] that purpose was accomplished by the inclusion of the Act's exemption clauses, and cannot be hindered by a state choosing to expose its own FEP law to constitutional scrutiny.

In short, title VII "is neutral on the subject of all employment practices it does not prohibit."[41] Its purpose is not to protect associational rights and a limited exemption from title VII's proscriptions cannot militate against its clear purpose—the elimination of discrimination in employment. Absent an express, specific intent to preempt state laws that proscribe private clubs' discriminatory employment practices, no such preemption occurs. Had Congress intended this preemption, it certainly could have chosen plainer language. It would be truly anomalous if the many exemptions from title VII's provisions were deemed to be legislative purposes paramount to the primary *articulated* legislative purpose of eliminating discrimination in employment on the enumerated bases. Of course, the constitutional character of associational rights and congressional concern for that character must be understood in order to comprehend that the preservation of private clubs' associational rights is not a preeminent legislative purpose embodied in title VII. That Congress, in light of the character of the right of association, chose not to specifically preclude states' enactments is of some import.

Perhaps a better indication that it was not Congress' purpose in enacting title VII to preempt state laws prohibiting private club em-

37. Fesal v. Masonic Home of Del., Inc., 428 F. Supp. at 577.

38. McGlotten v. Connally, 338 F. Supp. 448, 461 (D.D.C. 1972).

39. *See infra* text accompanying notes 70-126.

40. *See* Cornelius v. Benevolent Protective Order of Elks, 328 F. Supp. 1182, 1201 (D. Conn. 1974) (noting congressional "doubts" about the constitutionality of a public accommodations title that did not include an exemption for bona fide private membership clubs).

41. Shaw v. Delta Air Lines, Inc., 103 S. Ct. 2890 (1983).

ployment discrimination is the language of the Age Discrimination in Employment Act (ADEA).[42] Enacted a scant three years after title VII, the ADEA contains no provision exempting private clubs from discriminating on the basis of age in their employment practices. If Congress was so concerned with the sacrosanct right of association and the effects that proscribing discriminatory employment practices would have on this right, Congress surely would have exempted private clubs from compliance with the ADEA. Certainly, in an age-conscious society like ours, the right to associate with persons of one's age group is as important as the right to associate with persons of one's own race, national origin, religion, or sex. Yet Congress exhibited no such concern for private clubs in enacting the ADEA. This confluence of legislative action does not necessarily speak as much of the growth of enlightenment as it does of past legislative pragmatism. This confluence of legislative action puts into perspective the private club exemption contained in title VII and makes it clear that that exemption cannot be construed or elevated to be a congressional purpose. It further clarifies that private club associational rights are not, in the mind of Congress, paramount, constitutionally, to Congress' or the states' authority to regulate the privilege of employment through antidiscrimination statutes.

In addition to preempting any state law that is inconsistent with the purposes of the 1964 Act, section 1104 also invalidates state laws that are inconsistent with any provision of the federal statute.[43] "The word 'inconsistent' . . . does not mean merely inharmonious or unsymmetrical but connotes impossibility of concurrent operative effect."[44] Therefore, before title VII's exemption of private clubs can be found to preempt state FEP law provisions that define employers to include such clubs, a private club's compliance with the state's FEP law must result in a violation of the 1964 Act. A state's imposition of discrimination-free employment practices would not place private employers in a position of having to violate title VII. State enforcement would, instead, be additional to, and concurrent with, federal antidiscrimination statutes.[45]

This interpretation is buttressed by the Supreme Court's instruction in *Jones v. Rath Packing Co.*[46] that the preemption issue requires consideration of the relationship between state and federal laws as in-

42. 29 U.S.C. §§ 621-634 (1976).
43. 42 U.S.C. § 2000h-4 (1976).
44. *In re* Brown, 329 F. Supp. 422, 426 (S.D. Iowa 1971) (citations omitted).
45. *See* Jones v. Rath Packing Co., 430 U.S. 519, 540 (1977).
46. 430 U.S. 519 (1977).

terpreted and applied, not merely as written.[47] In *Jones*, the Court reviewed a California labeling law that required overweighting of packages, a result at variance with federal law as then written.[48] In validating the law the Court cited as determinative the fact that, despite the literal language of the federal labeling law, in practice the federal legislation, like its state counterpart, was not concerned with the overweighting problem in the administration of federal weights and measures laws.[49]

Similarly, federal authorities have not evidenced concern about the states' imposition of a broader liability on those employers exempted under the 1964 Act. Indeed, it is the practice of the Equal Employment Opportunity Commission (EEOC) to refer complainants to state agencies in the absence of title VII subject matter jurisdiction.[50] It would be highly incongruous for EEOC officers to refer cases over which it lacks jurisdiction to states that claim subject mattter jurisdiction if, in fact, title VII, the EEOC's enabling statute, preempts such state adjudication.[51] As in *Jones*, these instructions by the EEOC undercut the argument that there is a federal interest in preventing a result under state law at variance with that obtained under the federal law.[52] Instead, the above analysis makes it clear that state FEP laws that define "employers" to include private clubs are not preempted under the 1964 Act's general preemption provision.

47. *Id.* at 526 (citations omitted).

48. *See supra* note 24 & accompanying text.

49. Jones v. Rath Packing Co., 430 U.S. at 539.

50. *See* EEOC COMPLIANCE MANUAL §§ 1.4(a), 1.5(a), 2.1(c) & Exh. 1-B.

51. Compare Comment, *supra* note 22, where it is argued with reference to the Age Discrimination in Employment Act (ADEA) that:

> [E]qually unsuccessful would be the argument that forced deference to state laws which protect persons below forty from age discrimination hinders the ADEA's primary purpose by diluting the federal government's emphasis on protecting the older worker. With regard to preemption questions, the Supreme Court has stated that "the contemporaneous construction, not only of the courts, but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held controlling." Thus neither the Secretary of Labor nor the "officials whose duty it is to carry the law into effect" have voiced any concern for the type of hindrance mentioned here. Indeed, federal compliance officers, who are responsible for enforcing the ADEA on the state level, have stated that their agencies actually refer citizens to the state or federal law which provides the most protection. Since the agency in charge of enforcing the ADEA defers to broader state laws, the argument that such deference conflicts with the primary purpose of the ADEA is, at best, weak.

Id. at 309 (footnotes omitted).

52. Jones v. Rath Packing Co., 430 U.S. at 539.

The Saving Clause

The preceding discussion of the effect of title XI's section 1104 on state FEP law inclusion of private clubs, although useful for purposes of traditional preemption analysis, may be superfluous to a resolution of this inquiry: the general language of a statute will not be held to prevail over specific language in another part of the same statute.[53] Section 1104 applies to *all* of the Civil Rights Act of 1964, of which title VII is only one part.[54] More specifically, section 708[55] of title VII reads as follows:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.[56]

In drafting the 1964 Act, Congress chose to include this specific preemption provision to underscore the independent relationship between the state and federal jurisdictions in the field of employment practices. This provision constitutes a saving clause to preserve intact state FEP laws,[57] and was intended to preempt only state "protective" laws such as those that proscribe discriminatory treatment of working women.[58]

States are free to prosecute private clubs that discriminate in their employment practices because a contrary holding would contravene Congress' *codified* intent that entities subject to state laws shall not be

53. *In re* Brown, 329 F. Supp. 422, 425 (S.D. Iowa 1971) (citations omitted). "Section 227 specifically repeals 18 U.S.C., Section 2514 four years after the effective date of the Act. This specific section must control over any implication of immediate repeal in the general language of Section 259." *Id.* at 426.

54. Jones Metal Prod. Co. v. Walker, 29 Ohio St. 2d 173, 176, 281 N.E.2d 1, 5 (1972).

55. *See* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1226 (9th Cir. 1971).

56. 42 U.S.C. § 2000e-7 (1976). In citing this section, the Supreme Court has stated that "Title VII expressly preserves nonconflicting state laws." Shaw v. Delta Air Lines, Inc., 103 S. Ct. 2890, 2902 (1983).

57. *See, e.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1226 (9th Cir. 1971) (invalidating sex-based weight-lifting limitations); Le Blanc v. Southern Bell, 333 F. Supp. 602, 609 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir.), *cert. denied*, 400 U.S. 990 (1972) (invalidating sex-based weekly hours limitations).

58. Le Blanc v. Southern Bell, 333 F. Supp. 602, 609 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir.), *cert. denied*, 400 U.S. 990 (1972) ("We agree [that §§ 708 and 1104] were intended to save those state laws which aimed at preventing employment discrimination . . . ."). *See* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1226 (9th Cir. 1971) ("[§ 708] was designed to preserve the effectiveness of state anti-discrimination laws"); 110 CONG. REC. 6563 (1964) (comments of Sen. Kuchel) ("Title VII would not supersede nondiscrimination laws nor preempt any State authority in this area."); SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 678 (1976) ("Title VII does not supplant any state remedy; indeed, § 708 expressly recognizes that State remedies are unaffected.").

exempt from liability.[59] Thus, even if a state's exercise of police power would frustrate a federal purpose, when a national statute expressly saves certain state laws the courts follow this command "even if it appears inconsistent with the overall purpose of the statute and even if the state law forbids the exercise of opportunities expressly granted by the national law."[60] State requirement of discrimination-free employment practices by private clubs need not be based on any "unlawful employment practice" under title VII.[61] Indeed, this type of state regulation is saved by express provisions in the federal statute.

The Case Law

No final court decision has yet issued on the question of whether a state may proscribe discriminatory employment practices by private clubs.[62] However, there does exist a line of cases[63] involving the im-

59. *Cf.* Webster v. Bechtel, Inc., 621 P.2d 890 (Alaska 1981), wherein the court held that Alaska's Wage and Hour Act, which provided a higher minimum wage and a more liberal schedule for overtime payments than the Fair Labor Standards Act, was not preempted by the latter act. The employer had argued that one of the purposes of the federal act was to avoid duplicative litigation and that an employee should thus be precluded from instituting a private suit under state law once federal authorities had commenced an action against the employer. The court held that "[a]lthough it is certainly true that Congress intended to limit duplicative federal litigation, it does not follow that maintenance of a state action would frustrate that purpose," *id.* at 903-04, and went on to note:

> [I]f the Secretary's suit terminated private state suits, it would prevent employees from recovering the additional increment of wages which they are entitled to under the state law, thereby frustrating Congress' clear intent established in § 218(a) that no provision of this chapter . . . shall excuse noncompliance with . . . any State law providing for such additional recovery.

Id. at 904.

60. Note, *supra* note 26, at 366 (footnote omitted). *Cf.* Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 102-03 (1963) (The Court cited the saving clause of the National Labor Relations Act and held that, despite the fact that the NLRA's express purpose was to foster collective bargaining, and "even if the union-security agreement clears all federal hurdles, the States by reason of § 14(b) have the final say and may outlaw it. There is thus conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws barring the execution and enforcement of union-security agreements."); Webster v. Bechtel, Inc., 621 P.2d 890, 900 (Alaska 1981) (the court noted that "a saving clause may prevent preemption of state statutes which conflict with the purpose of a federal statute").

61. *Cf.* Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination, 375 Mass. 160, 167, 375 N.E.2d 1192, 1198 (1978) (The court reasoned that "*Gilbert* interpreted 42 U.S.C. § 2000e-2(a)(1) as not requiring the inclusion of pregnancy-related disabilities in a disability plan; *Gilbert* did not hold that the inclusion of pregnancy-related disabilities violated Title VII. Hence, an interpretation of [the state's antidiscrimination law] which required the inclusion of such disabilities in a comprehensive disability plan would not require . . . the doing of any act which would be an unlawful employment practice under [Title VII].").

62. In DFEH v. Bohemian Club, FEHC Dec. No. 81-19 (1981), the California Fair

plied repeal of the Civil Rights Act of 1866 to the degree that it regulates the activities of private clubs exempt under the 1964 Act.[64] The ultimate issue in these cases was whether Congress' inclusion of the private club exemptions in the 1964 Act mandates non-recognition of alternative causes of action against such entities under other federal antidiscrimination law. Although these cases are relevant to the instant discussion, they are inapposite to the issue of title VII's possible preemptive effect on *state* legislation.

The fundamental distinction between the implied repeal cases and the preemption issue at hand is that the former involves an intra-federal squabble while the latter involves principles of federalism.[65] Indeed, the issue of whether the 1964 Act affects the 1866 Act cannot

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Employment and Housing Commission ruled that title VII does not preempt California's regulation of the employment practices of private clubs, and that the all-male Bohemian Club's practice of employing only men violated the state's antidiscrimination employment laws. *See supra* note 7.

As of the date of publication of the Article the final decision on the appeal of this case to the Superior Court has not yet been issued. However, the tentative decision of the superior court indicates that a preemptory writ of mandamus shall be issued to compel the Commission to vacate its order. Bohemian Club v. FEHC, No. 119026 (Sonoma County Super. Ct., tentative decision filed Mar. 25, 1983). One reason for the court's tentative decision to order respondent to set aside its decision is that the FEHC had proceeded without jurisdiction because application of the state law to a bona fide private club "is inconsistent with, and superseded by federal law." *Id.* at 3.

Evidently the superior court has reached the tentative conclusion that the exemption from title VII contained in § 701(b) preempted the state's regulation of private club employment practices. It would appear that the superior court was persuaded by the argument that application of California's Fair Employment and Housing Act (FEHA) to the Bohemian Club would be inconsistent with the congressional purpose of exempting private clubs from title VII. This implies that the court found the general preemption provision, § 1104, to control title VII's saving clause, § 708. The tentative decision of the superior court contains no analysis of this issue. It is integral to this Article's thesis that the superior court has tentatively erred. *See supra* notes 27-61 & accompanying text.

63. Hereinafter referred to as the "implied repeal cases."

64. *See, e.g.*, Tillman v. Wheaton-Haven Recreation Ass'n, 451 F.2d 1211, 1214 (4th Cir. 1971) (holding that the 1964 Act's explicit private club exemption must be read by implication into § 1981 and thus a black person could not obtain membership in a private club under the 1866 Act), *rev'd*, 410 U.S. 431 (1973); Hudson v. Charlotte Country Club, Inc., 535 F. Supp. 313, 317 (W.D.N.C. 1982) (holding that the private club "exemption in Title VII supercedes and limits § 1981 so as to bar the employment discrimination suit under § 1981" by a black complainant who alleged that his termination as a maintenance worker was racially motivated); Kemerer v. Davis, 520 F. Supp. 256, 260 (E.D. Mich. 1981) (holding that "private membership clubs are impliedly exempted from the provisions of § 1981 by virtue of the explicit, conflicting and therefore superseding exception of Title VII" and thus the white complainant who alleged that his termination as a security guard was racially motivated could not state a cause of action under the 1866 Act); Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1201 (D. Conn. 1974) (same as *Tillman*).

65. For a cogent argument for judicial restraint in the latter circumstances, see Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539-40 (1947).

raise a supremacy clause question because both were passed by the federal legislature. Furthermore, while apparently all courts are in agreement that the Congress which drafted the 1964 Act did so without consideration of the Civil Rights Act of 1866,[66] it is also established that Congress' decision in the 1964 legislation to expressly promote cooperation with the states came as a result of growing resistance to federal power in areas traditionally occupied by the states.[67] Indeed, in light of Congress' substantial deference to states' rights legislation as revealed in numerous title VII provisions,[68] a plausible secondary purpose of Congress in enacting the 1964 Act was to avoid unwarranted federal instrusion into an area that historically has been the states' domain. The courts in the implied repeal cases did not address this pivotal concern. Nor did they reconcile their analyses with title VII's saving clause which, by its terms, is directed only to the survivability of state FEP laws and is Congress' definitive word on that subject.[69]

While the implied repeal cases are unhelpful to a proper determination of the preemption issue, they are also unpersuasive in their own right. Moreover, they employ misleading analyses that obfuscate private club employers' perceptions as to their responsibilities for provid-

66. *See* cases cited *supra* note 64.

67. Comment, *supra* note 22, at 302.

68. *See, e.g.*, 42 U.S.C. §§ 2000e-4(g)(1) (mandates federal cooperation with state agencies); 2000e-5(c) (prohibits federal action prior to sixty days after state proceedings have commenced); 2000e-5(d) (requires the EEOC to notify state authorities as to any charge made within the state's jurisdiction and to refrain from proceeding on the charge for a period of sixty days if requested to do so); 2000e-8(b) (authorizes written agreements between the EEOC and its state counterparts which may include provisions restricting federal authority to proceed in any case or class of cases and against any person or class of persons); 2000e-8(d) (dictates consultation and coordination of reporting requirements with state agencies, and provides for federally-secured employment information to be furnished to a state at its request) (1976 & Supp. V 1981).

69. *See supra* text accompanying notes 42-52. The 1964 Act's public accommodations title contains a saving clause that addresses the survivability of both federal and state laws with respect to matters covered under that title. Section 207(b) of title II states:

> The remedies provided in this subchapter shall be the exclusive means of enforcing the rights based on this subchapter, but nothing in this subchapter shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this subchapter, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

42 U.S.C. § 2000a-6(b) (1976). Only the court in *Cornelius v. Benevolent Protective Order of Elks* mentioned this provision in reading by implication title II's private club exemption into the 1866 Act. In its sole equivocal reference to the clause the court opined that it "does not preclude but rather provides for the possibility of a limitation of earlier legislation." 382 F. Supp. 1182, 1202 (D. Conn. 1974).

ing discrmination-free employment under state laws and under section 1981 of the Civil Rights Act of 1866.

In only two cases, *Kemerer v. Davis*[70] and *Hudson v. Charlotte Country Club*,[71] have courts held explicitly that title VII's private club exemption must be read by implication into section 1981, precluding employment discrimination suits against private clubs under the 1866 Act. These courts have so held without the benefit of any legislative history to support that conclusion.[72] Instead, the courts have chosen to rely on lower court decisions, such as *Cornelius v. Benevolent Protective Order of Elks*,[73] and decisions reversed on appeal, such as *Tillman v. Wheaton-Haven Recreation Association*[74] and *Wright v. Salisbury Club, Ltd.*[75] In these latter cases, complainants sought membership in private clubs. The courts held only that the private club exemption clause of the 1964 Act's public accommodations title[76] must, by implication, be read into the 1866 Act. The clear difference between the *membership* practices at issue in *Cornelius*, *Tillman*, and *Wright*, and the *employment* practices at issue in *Kemerer* and *Hudson* is a critical one. Indeed, the *Cornelius* court recognized this fact in its analysis of the nature of club membership:

> [I]f the term "social rights" has any meaning, it would appear to apply here. Cornelius' interest in joining the private club of his choice surely does not consitute a basic right of citizenship. We recognize, of course, that "social rights" and "civil rights" are but extremes on the broad spectrum of the "social contract."[77]

Whatever may be the status of one's "right" to obtain membership in a private club, one's right to discrmination-free employment opportunitites is civil in nature, and the opportunity to enforce such a right under the 1866 Act should not be thoughtlessly eschewed under the rubric of a "social rights" analysis.

The Supreme Court's reasoning in *Runyon v. McCrary*[78] is particularly apposite in exposing the salient difference between the nature of

70. 520 F. Supp. 256, 260 (E.D. Mich. 1981).

71. 535 F. Supp. 313, 317 (W.D.N.C. 1982).

72. *See supra* text accompanying notes 37-40.

73. 382 F. Supp. 1182 (D. Conn. 1974).

74. 451 F.2d 1211 (4th Cir. 1971), *rev'd on other grounds*, 410 U.S. 431 (1973).

75. 479 F. Supp. 378 (E.D. Va. 1979), *rev'd on other grounds*, 632 F.2d 309 (4th Cir. 1980).

76. 42 U.S.C. § 2000a(e) (1976).

77. Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. at 1199. *Cf.* Bell v. Maryland, 378 U.S. 226, 294-95 n.14 (1964) (Goldberg, J., concurring) ("[T]here are two kinds of relations of men, those that are controlled by the law and those that are controlled by personal choice. The former involves civil rights, the latter social rights.").

78. 427 U.S. 160 (1976).

title II's subject matter and that of title VII. The *Runyon* Court confronted a factual situation of private school discrimination in enrollment practices. Like clubs that are characterized as "private" for most purposes but should be treated as "public" for purposes of evaluating their rights as employers,[79] the challenged schools were characterized by the Court as "private" in the sense that they were not receiving public funds, but "public" in the sense that they recruited all Caucasian students who met the schools' facially neutral qualifications.[80] The Court held that

> parents have a First Amendment right to send their children to education institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.[81]

The Supreme Court thus recognized that a spectrum of rights exists on which a particular practice can be positioned, and the location on the spectrum is determined by the practice itself. Thus, the location of a private club's employment practice on the spectrum is not dependent on the club's status for purposes of evaluating its membership practices. The only case that could be made for implied repeal of section 1981 is that Congress intended to shield private clubs from regulation of their bona fide membership practices.[82] It cannot fairly be said that the failure of Congress to include private clubs within title VII's definition of "employer"[83] evidences an intent to have private clubs immunized from other employment laws.[84]

Closer examination of the rationale for finding that the private club exemption of title II limits the scope of section 1981 demonstrates the error in the *Kemerer* holding that title II's exemption applies with

79. As stated by Justice Douglas in his concurrence in Lombard v. Louisiana, 373 U.S. 267 (1963), "there is hardly any private enterprise that does not feel the pinch of some public regulation—from price control, to health and fire inspection, to zoning, to safety measures, to minimum wages and working conditions, to unemployment insurance." *Id.* at 280-81.

80. Runyon v. McCrary, 427 U.S. 160, 172 n.10 (1976).

81. *Id.* at 176 (emphasis in original).

82. *See* Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1201-02 (D. Conn. 1974) ("Leading opponents of the Act argued that people have a constitutional right to choose their *associates*. Supporters responded by arguing that 'where freedom of association might logically come into play as in cases of private organizations, *Title II* quite properly exempts bona fide private clubs . . . .' ") (citations omitted) (emphasis added).

83. 42 U.S.C. § 2000e(b) (1976).

84. The characterization is from Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1200 (D. Conn. 1974) ("Congress has immunized [private club] discrimination with regard to membership from the coverage of [the 1964] Act.").

equal force to section 1981.[85] The *Kemerer* court cited *Wright*[86] for the recognized rule of statutory construction that repeal by implication is not favored. To support an implied repeal courts require that the two provisions be in irreconcilable conflict and that the legislature intended repeal.[87] It cannot plausibly be argued that either requirement is met here.

With respect to the purported "irreconcilable conflict" between title VII and section 1981, the *Kemerer* court stated that if section 1981 were applied literally, it would reach within private establishments protected by the 1964 Act and the two statutes would then be in conflict.[88] The *Wright* court, however, incorrectly used the word "protected" to describe private clubs' relationship to the 1964 Act.[89] It has never been suggested that the 1964 Act was intended to extend the rights of private clubs beyond those found in the Constitution. As the Supreme Court state in *Norwood v. Harrison*,[90] while the Constitution does not proscribe private bias, it does not protect discrimination.[91]

85. Kemerer v. Davis, 520 F. Supp. 256, 258 (E.D. Mich. 1981).

86. *Id.* (citing Wright v. Salisbury Club, Ltd., 479 F. Supp. 378, 386 (E.D. Va. 1979), *rev'd on other grounds*, 632 F.2d 309 (4th Cir. 1980)).

87. *Id.*

88. *Id.*

89. Wright v. Salisbury Club, Ltd., 479 F. Supp. 378, 386 (E.D. Va. 1979), *rev'd on other grounds*, 632 F.2d 309 (4th Cir. 1980).

90. 413 U.S. 455 (1973).

91. "Invidious private discimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but has never been accorded affirmative constitutional protections." *Id.* at 470. *Accord* Runyon v. McCrary, 427 U.S. 160, 176 (1976).

Indeed, a strong case can be made that a conclusion that Congress intentionally exempted private clubs from coverage under the 1964 Act in order to secure for clubs an unfettered right to discriminate in their membership and employment practices should result in a holding that the 1964 Act as thus interpreted constitutes a denial of due process under the fifth amendment. Principal support for this contention is the case of Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), *aff'd*, 387 U.S. 369 (1967). In *Mulkey*, the California Supreme Court held that Proposition 14, which added to the state's constitution a right "to decline to sell, lease or rent [real] property to such person or persons as [one], in his absolute discretion, chooses," violated the equal protection clause of the fourteenth amendment because the electorate had "taken affirmative action of a legislative nature designed to make possible private discriminatory practices which previously were legally restricted." *Id.* at 541-42, 413 P.2d at 833-34, 50 Cal. Rptr. at 889-90. The *Mulkey* court addressed a situation in which the electorate fully intended to repeal the state's fair housing law to permit invidious discrimination. This fact invites the argument that *Mulkey* is therefore inapposite to the Congress' passage of the 1964 Act's exemption provisions because, unlike the California electorate, Congress had lofty constitutional considerations in mind when it circumscribed the parameters of the 1964 Act to exclude private clubs. *See supra* text accompanying note 40. Moreover, when Congress "enacted the 1964 legislation, it did not and could not have known about the [availability of a private cause of action under] the 1866 Act [because] not until 1968, four years after the 1964 Act became law, did the

Although the *Hudson* court did not directly confront the question of whether there exists an "irreconcilable conflict" between title VII and section 1981, it did implicitly address that requirement in reaching its conclusion that if private clubs are exempt from employment discrimination suits under title VII but subject to suit under section 1981 for the same offense, the exemption in title VII is meaningless.[92] That assertion is incorrect. Title VII and section 1981 afford two distinct remedies for victims of discrimination.[93] The chief handicap of complainants who are precluded from seeking redress under title VII because the discriminating entity is not an "employer" within the meaning of section 701[94] is their inability to avail themselves of the federal machinery that was installed to facilitate conciliation agreements and thus obviate costly private action.[95] This result can hardly

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Supreme Court first determine that the Civil Rights Act of 1866 prohibited 'private' as well as officially sanctioned discrimination." Wright v. Salisbury Club, Ltd., 479 F. Supp. 378, 386 (E.D. Va.), *rev'd on other grounds*, 632 F.2d 309 (4th Cir. 1980).

The argument is not persuasive. As the United States Supreme Court stated in Norwood v. Harrison, 413 U.S. 455 (1973), in holding that Mississippi may not loan books to sectarian schools that discriminate on the basis of race:

> [G]ood intentions as to one valid objective do not serve to negate the [government's] involvement in violation of a constitutional duty. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." The Equal Protection Clause would be a sterile promise if [government] involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal.

Id. at 466-67 (citation omitted). Moreover, the *Mulkey* court grounded its decision on the ultimate fact that the state had "lent its processes to the achievement of discrimination." 64 Cal. 2d at 537, 413 P.2d at 830-31, 50 Cal. Rptr. at 886-87. The same must be said of the Congress' decision to exclude private clubs from the reach of the 1964 Act if one concludes that private clubs may violate state FEP laws because Congress evidenced an intention that they be permitted to discriminate. Such a congressional "authorization" is, according to the *Mulkey* court, for purposes of constitutional analysis, equivalent to governmental imposition of discriminatory practices. *Id.* at 540-41, 413 P.2d at 832-32, 50 Cal. Rptr. at 888-89.

The proper perspective for viewing the 1964 Act's private club exemption provisions is not that Congress has "elected to place its power . . . and prestige behind the admitted discrimination," Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961), by preempting state prerogatives to proscribe discrimination by private clubs, but rather it is to recognize that Congress is under no "obligation to take positive action in an area where it is not otherwise committed to act," Mulkey v. Reitman, 64 Cal. 2d at 537, 413 P.2d at 830-31, 50 Cal. Rptr. at 886-87, and that the 1964 Act, as thus interpreted, is constitutional.

92. Hudson v. Charlotte Country Club, Inc., 535 F. Supp. 313, 317 (W.D.N.C 1982).

93. Long v. Ford Motor Co., 496 F.2d 500, 504 n.7 (6th Cir. 1974). *See also* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 458 (1975).

94. 42 U.S.C. § 2000e(b) (1976).

95. Indeed, one may postulate that it was Congress' intent in exempting private clubs from the ambit of title VII to merely preclude the use of federal resources in pursuit of a class of employers which, it can be argued, should be secondary game in the hunt for violators of civil rights. Such a purpose, of course, is unaffected by divergent state practices.

be described as "meaningless" and certainly cannot be characterized as "of no practical effect."[96]

The result in *Long v. Ford Motor Co.*[97] supports this conclusion. The *Long* court had before it a complainant who failed to meet the EEOC requirement that a charge be filed with the EEOC within 210 days of the alleged violation.[98] The court held that a plaintiff is not required to pursue his title VII remedies before instituting an action under section 1981.[99] A complainant's circumvention of a jurisdictional prerequisite for bringing a title VII suit does not render title VII's procedural jurisdictional requirements of no practical effect.[100] Therefore, it is unpersuasive to argue that a complainant who fails to meet a substantive jurisdictional requirement and so proceeds under section 1981 somehow debilitates the strictures of title VII. The *Long* court concluded that title VII is not in irreconcilable conflict with section 1981, and that "it does not cover the field in which section 1981 was sown."[101]

With respect to the second requirement for implied repeal—congressional intent to have such an effect[102]—the *Kemerer* and *Hudson* courts again rely on the title II cases,[103] and specifically on language in *Wright*:

> When Congress enacted the 1964 legislation, it did not and could not have known about the conflict with the 1866 Act. Indeed, not until 1968, four years after the 1964 Act became law, did the Supreme Court first determine that the Civil Rights Act of 1866 prohibited 'private' as well as officially sanctioned discrimination.[104]

96. Compare Jones v. Mayer Co., 392 U.S. 409 (1968), in which the Court highlighted the federal machinery made available to housing complainants under the newly enacted Open Housing Act and observed that "although § 1982 contains none of the exemptions that Congress included in the Civil Rights Act of 1968, it would be a serious mistake to suppose that § 1982 in any way diminishes the significance of the [Open Housing Act]." *Id.* at 413-16 (citation omitted). The Court then cited the 1968 Act's saving clause and concluded that the 1968 Act "had no effect upon § 1982." *Id.* at 416-17 n.20 (citations omitted).

97. 496 F.2d 500 (6th Cir. 1974). *See* 42 U.S.C. § 2000e-5(e) (1976) (now provides a 180-day period for filing a complaint).

98. Long v. Ford Motor Co., 496 F.2d at 503.

99. *Id.*

100. *Id.* (citations omitted).

101. *Id.* at 504.

102. It is the rule that the "intention of the legislature to repeal a statute must be clear and manifest, and it is not sufficient to establish that a subsequent law covers some of all of the cases provided for by the prior act." *In re* Brown, 329 F. Supp. 422, 426 (S.D. Iowa 1971).

103. Hudson v. Charlotte Country Club, Inc., 535 F. Supp. 313, 316-17 (W.D.N.C. 1982); Kemerer v. Davis, 520 F. Supp. 256, 258 (E.D. Mich. 1981).

104. Wright v. Salisbury Club, Ltd., 479 F. Supp. 378, 386 (E.D. Va. 1979), *rev'd on other grounds*, 632 F.2d 309 (4th Cir. 1980) (citations omitted).

The *Wright* court, however, failed to address the relevant and, indeed, determinative question: had it known the scope of the 1866 Act, would the Congress that enacted the 1964 legislation have modified the earlier sweeping civil rights statute by restricting its provisions to parallel those then under review? The courts in the implied repeal cases have, without discussion, answered yes.[105] This response is erroneous. These courts have been unable "to see the forest for the trees." As one commentator imaginatively answered the question:

> The proper inquiry should be whether, and in what form, Congress would have *enacted Title VII*. The enactment of Title VII was the culmination of many years of strenuous efforts by civil rights forces, both within Congress and without. . . . Congressional civil rights advocates, who had fought a long battle to enact legislation to ameliorate the condition of the black workingman, would not likely surrender such a potentially potent weapon as section 1981 in exchange for Title VII, whose [sic] broader scope is more than offset by its complicated procedure and almost total lack of enforcement provision. Had Congress been aware of the existence of a section 1981 action, necessary votes could probably not have been mustered to repeal or modify that statute.[106]

It cannot be implied that Congress would have modified section 1981 to conform exactly to the 1964 Act. *Kemerer* and *Hudson* were thus wrongly decided.[107]

An additional obstacle perceived by the *Kemerer* and *Hudson* courts to maintaining employment discrimination suits against private clubs under section 1981 is a passage from Justice Stevens' majority opinion in *New York City Transit Authority v. Beazer*.[108] There, the Supreme Court held that the Transit Authority's blanket exclusion of methadone users from employment did not violate title VII, section 1981, or the equal protection clause.[109] After berating the court of appeals for failing to address the statutory issues before addressing the constitutional claim (indeed, for failing even to review the district court's finding of liability under title VII), Justice Stevens stated that

105. *See supra* note 64 & accompanying text.

106. Comment, *Is Section 1981 Modified by Title VII of the Civil Rights Act of 1964?*, 1970 DUKE L.J. 1223, 1235 (emphasis in original).

107. I do not suggest that the courts that read title II's private club exemption clause into the 1866 Act by implication have necessarily reached the wrong result. *See* Runyon v. McCrary, 427 U.S. 160, 187 (1976) (Powell, J., concurring) (some contracts may not be mandated under the 1866 Civil Rights Act not because of an implied repeal of its provisions but because "some contracts are so personal 'as to have a discernible rule of exclusivity which is inoffensive to § 1981' ") (citation omitted).

108. 440 U.S. 568 (1979).

109. *Id.* at 587, 593.

the Court would dispose of the title VII claim without a remand.[110] Justice Stevens further stated, in a footnote, that the lower court's treatment of the title VII claim disposed of the section 1981 claim without need to remand. "Although the exact applicability of that provision has not been decided by this Court, it seems clear that it affords no greater substantive protection than Title VII."[111]

The *Kemerer* and *Hudson* courts' reliance on this language to engraft on the statute a requirement that defendants in a section 1981 action be subject to title VII cannot be supported. While Justice Stevens' remark may be a reference to the fact that he does not believe Congress intended section 1981 to apply to the area of employment discrimination covered by title VII,[112] it makes little sense to isolate the statement from its context—the availability of avenues of relief for a claim of *adverse impact* on Blacks and Hispanics. Justice Stevens' acknowledgment that the exact applicability of section 1981 was not yet decided by the Court was not a cryptic reference to the fact that the implied repeal issue remains an open question; it was simply the verbalized recognition that the Court had not decided whether section 1981 required showing of purposeful discrimination.[113] Because it had long been the law that a claim under title VII required no such showing,[114] Justice Stevens merely stated that, with respect to claims that a facially neutral employment practice has a disproportionate impact on a protected class, section 1981 could afford no greater substantive protection than title VII and thus treatment of the title VII claim would also dispose of the section 1981 claim without need to remand.[115]

The *Kemerer* and *Hudson* courts' interpretation of the language in *Beazer* is unreasonable when placed in context, and produces an unjust result: immunization of employers with fewer than fifteen employees from the reach of section 1981 because section 701 also excludes such entities from title VII's definition of "employer".[116] Justice Stevens could not have intended that this footnote have such a sweeping meaning.

110. *Id.* at 579-80.

111. *Id.* at 583-84 n.24.

112. General Bldg. Contractors Ass'n v. Pennsylvannia, 102 S. Ct. 3141, 3158 (1982) (Stevens, J., concurring). *See also* Runyon v. McCrary, 427 U.S. 160, 190 (1976) (Stevens, J., concurring).

113. That question has been answered in the affirmative. *See* General Bldg. Contractors Ass'n v. Pennsylvania, 102 S. Ct. 3141, 3149 (1982).

114. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

115. General Bldg. Contractors Ass'n v. Pennsylvania, 102 S. Ct. 3141, 3158 (1982) (Stevens, J., concurring).

116. 42 U.S.C. § 2000e(b) (1976).

The inapplicability of the *Beazer* decision, however, should not suggest that the Supreme Court has failed completely to provide guidance in analyzing the relationship between the civil rights statutes. In *Sullivan v. Little Hunting Park, Inc.*,[117] the Court held that title II did not supersede section 1982.[118] "[T]he hierarchy of administrative machinery provided by the 1964 Act is not at war with survival of the principles embodied in section 1982. There is, moreover, a saving clause in the 1964 Act as respects any right based on any other Federal . . . law not inconsistent with that Act."[119] In *Alexander v. Gardner-Denver Co.*,[120] the Court held that a complainant's submission to binding arbitration did not foreclose a subsequent title VII action.[121] The Court made clear Congress' intent to allow individuals to pursue all possible remedies under other federal and state statutes.[122] In *Johnson v. Railway Express Agency, Inc.*,[123] the Court held that the filing of a title VII complaint does not toll the statute of limitations for purposes of a section 1981 claim. "We generally conclude . . . that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."[124] The Court also made clear that the private clubs exempted under section 701(b) of title VII are still subject to suit under section 1981 of the 1866 Act.[125] In the final analysis, it is unpersuasive to maintain that the Supreme Court's description of section 1981's relationship to title VII as "independent" can be reconciled with a holding that the availability of section 1981 is dependent on the defendant's status under title VII.

117. 396 U.S. 229 (1969).

118. *Id.* at 237.

119. *Id.* at 237-38 (citations omitted).

120. 415 U.S. 36 (1974).

121. *Id.* at 49.

122. *Id.* at 48 ("the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes").

123. 421 U.S. 454 (1975).

124. *Id.* at 461. The *Hudson* court actually cited the second sentence of this passage and then inexplicably ignored its conceptual value and summarily dismissed its precedential worth, stating that "the Supreme Court in *Johnson* cannot be fairly said to have directly decided the issue of whether the bar on suing private clubs in Title VII is also applicable, by statutory implication, to suits brought under § 1981." Hudson v. Charlotte Country Club, Inc., 535 F. Supp. 313, 316 (W.D.N.C. 1982).

125. Johnson v. Railway Express Agency, Inc., 421 U.S. at 459.

Conclusion

It is true that title VII must be construed liberally.[126] However, one need not resort to that rule of construction alone to conclude that section 708 allows states to require that *all* employers engage in discrimination-free employment practices.[127] The purpose of title VII is to eliminate discrimination in employment on several enumerated bases. Congressional reluctance to extend this law of antidiscrimination in employment to private clubs acting as employers is not a *purpose* of the statute. It is merely a reluctance to act. That reluctance cannot be viewed as paramount to the broad purpose of Congress to promote equal employment opportunity. At best, the reluctance was a reflection of congressional concern not to legislate in an area possessing constitutional implications. At worst, it is a reflection of legislative pragmatism written into the statute to avoid difficulties in passing the statute.

Either way, the congressional refusal to extend a federal statute to include particular entitites is hardly a prohibition of the states doing so. The control of employers' privilege of employment is traditionally a state concern. Proscription of a local prerogative requires more than an exemption embodying congressional shyness. This is particularly true in the face of a saving clause that dictates that all employers must comply with any and all state laws unless, and only unless, the state law requires or permits the doing of an act that would be unlawful under title VII. The broader preemption provision contained in title XI further clarifies that Congress did not intend to occupy the field and that state laws are not invalidated unless they are inconsistent with a purpose or provision of a title of the 1964 Act. Legislating in an area where Congress merely chose not to is not inconsistent with a purpose or provision of title VII.

If the effect of title VII was to preempt state laws proscribing private clubs' discriminatory employment practices, the very purpose of title VII—the elimination of discrimination in employment—would be defeated. To argue that it was the congressional intent to permit discriminatory practices in employment and that it was the purpose of Congress to preclude the states from proscribing discrimination is to ascribe to Congress an unlawful and unconstitutional intent and purpose: the promotion of discrimination in employment. If such was

126. Quijano v. University Fed. Credit Union, 617 F.2d 129, 131 (5th Cir. 1980).

127. *See* 2A J. SUTHERLAND, STATUTORY CONSTRUCTION § 46.01, at 48 (4th ed. 1976) (" 'Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.' ") (citation and footnote omitted).

Congress' purpose, it would violate the fifth amendment's due process clause, and not just the letter and the spirit of title VII.

That Congress did not intend to have its exemption of private clubs interpreted as a purpose of title VII is also discernible from the words of the late Senator Hubert H. Humphrey quoted at the outset. Senator Humphrey spoke to the issue in precise language and made it clear that he was addressing federal legal provisions. It is one thing for a Senator to argue that federal laws ought not proscribe certain activity; it is a wholly different—and incorrect—interpretation of Senator Humphrey's statements to conclude that the Congress intended to prohibit the states from enacting laws more protective of their citizenry's rights than the federal government was then willing to do.

Further support for this Article's thesis is found in the fact that Congress itself choose not to exempt private clubs from coverage under the ADEA of 1967. It would be unkind to submit that Congress was more or less noble, depending on one's view, concerning the issue of age than concerning the issues of race, national origin, religion, or sex. It certainly deflates the import of the issue of the constitutional right of association, and therefore puts that issue in proper perspective, to recognize that Congress, barely three years after enacting the 1964 Act, completely ignored any possible consequences to the associational rights of private clubs in the ADEA. It makes more persuasive the explanation that Congress was merely reluctant to extend its title VII proscriptions to private clubs because of the more volatile nature of that legislation. It is one thing to not prohibit discrimination, and another to promote discrimination.

The very fact that Congress did not specifically and unequivocally extend its federal exemption of private clubs to the states is proof beyond cavil that Congress did not intend to prohibit the states from doing that which is their established prerogative. Title VII does not preempt state regulation of private clubs' employment practices.